

United States District Court

For the Northern District of California

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7 John Frederic Garmon,

8 Plaintiff,

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10 No. C 04-3772 WDB

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12 **ORDER TO PROVIDE  
CLARIFICATION OR RESPONSE  
RE ISSUES**

13 v.

14 Peralta Community College District,  
et al.,

15 Defendant(s).  
16 \_\_\_\_\_ /

17 By **Monday, April 17, 2006, at 4:00 p.m.**, the parties must file with the Court,  
18 deliver to chambers, and serve on opposing counsel their responses to **all** of the  
19 following:

20 1. Plaintiff's Second Amended Complaint does not differentiate among the  
21 defendants with respect to most claims. It is the Court's view that plaintiff's claims  
22 for race discrimination, gender discrimination, retaliation, and intentional infliction  
23 of emotional distress challenge conduct by Peralta Community College District and  
24 by the Peralta Community College District Board of Trustees and do not assert claims  
25 against Mr. Moore as an individual. Plaintiff must state whether the Court's  
26 understanding is accurate. If plaintiff intends to assert a claim for race  
27 discrimination, gender discrimination, retaliation, or intentional infliction of

1 emotional distress against Mr. Moore in his individual capacity, plaintiff must set  
2 forth the bases for any such claims.

3       2. Plaintiff's Second Amended Complaint asserts that Mr. Moore's  
4 allegedly defamatory statements were "unauthorized" by the other defendants but also  
5 makes the inconsistent statements that the other defendants knew about and ratified  
6 those statements and that the defendants "conspired" to defame plaintiff. Plaintiff  
7 must state whether his claim for defamation is made only against Mr. Moore, as an  
8 individual, or whether plaintiff also intends to assert a claim for defamation against  
9 Peralta and/or the Board. If plaintiff intends to assert a claim for defamation against  
10 Peralta and/or the Board plaintiff must set forth the bases for such a claim.

11       3. It is not obvious to the Court that any of the conduct identified in  
12 Plaintiff's Basis for Going Forward with His Intentional Infliction of Emotional  
13 Distress Claims, filed April 6, 2006, is "outrageous" even under a generous reading of  
14 plaintiff's proffer. The Court is strongly inclined to the view that under controlling  
15 authorities employment decisions such as 'firing' are not classified as "extreme and  
16 outrageous" even if motivated by unlawful considerations such as discrimination or  
17 retaliation unless the alleged manner in which the decision is implemented or the  
18 manner in which it is communicated to plaintiff arguably warrants the label  
19 "outrageous." As we read it, plaintiff's proffer does not allege conduct that satisfies  
20 that standard.

21           Plaintiff must respond to defendants' Motion to Dismiss Claim for [Intentional]  
22 Infliction of Emotional Distress, filed April 13, 2006.

23       4. The parties' proposed jury instructions include definitions of the term  
24 "adverse employment action," in the context of the race and gender discrimination  
25 and retaliation claims. It is our understanding that defendants do not dispute that  
26 their decision not to renew Mr. Garmon's contract to serve as President of Vista  
27 constitutes, as a matter of legal definition, an "adverse employment action."

1 Accordingly, the Court will not instruct the jury about the definitions of "adverse  
2 employment action." Where the instructions would direct the jury to decide that  
3 element, the Court will refer directly to the fact that plaintiff's contract was not  
4 renewed. If defendants contend that the decision not to renew plaintiff's contract does  
5 not qualify as an "adverse employment action" they must inform the Court.

6 5. Title VII makes it unlawful for an employer to discriminate against an  
7 employee for opposing race discrimination. However, the employee must reasonably  
8 believe that the challenged employment practices are discriminatory. It is the Court's  
9 understanding that defendants do not contend that Mr. Garmon's belief that the  
10 challenged employment practices were discriminatory was "unreasonable."  
11 Accordingly, the first element of the jury instructions for plaintiff's retaliation claim  
12 will direct the jury to determine whether Mr. Garmon proved that he "opposed  
13 conduct by defendants that he believed was discriminatory." Unless defendants  
14 advise the Court that they have a basis for contending that Mr. Garmon's belief was  
15 not "reasonable," the Court will not use the phrase "reasonably believed."

16 6. There is no right to have a jury determine the amount of back pay or  
17 front pay under Title VII. These remedies constitute equitable relief awarded by the  
18 Court. *E.g., Lutz v. Glendale Union High School*, 403 F.3d 1061, 1069 (9th Cir.  
19 2005). The parties may, however, consent to have these issues determined by the jury  
-- in which case its "verdict has the same effect as if trial by jury had been a matter  
21 of right." F.R.C.P. 39(c). If the parties do not consent, and if the findings by the jury  
22 give rise to an occasion for determining back pay and/or front pay, the Court will  
23 conduct an evidentiary hearing after the trial to determine these issues. The parties  
24 must state whether they wish to consent to have the jury decide the appropriate  
25 amount of back pay and/or front pay in the event that the jury's verdict makes such  
26 remedies available.

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7. Apparently in response to this Court's order directing plaintiff to notify the Court whether he wants to proceed with his claim "under 42 U.S.C. §1983" (alleging retaliation for exercising First Amendment rights), plaintiff filed his dismissal without prejudice of his "section 1981 claims." Does the Court accurately infer that plaintiff meant to dismiss his §1983 claim and that the reference to §1981 was an error? As the Court reads plaintiff Second Amended Complaint, plaintiff has not asserted a claim under 42 U.S.C. §1981.

IT IS SO ORDERED.

Dated: April 13, 2006

/s/ Wayne D. Brazil  
WAYNE D. BRAZIL  
United States Magistrate Judge

Copies to:  
Parties, WDB  
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